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BEFORE THE
SURFACE TRANSPORTATION BOARD

COMPETITION IN THE RAILROAD INDUSTRY	Ex Parte No. 705	ENTERED Office of Proceedings JUN 10 2011 Part of Public Record

NOTICE OF INTENT AND WRITTEN TESTIMONY OF THE CONCERNED CAPTIVE COAL SHIPPERS

The Concerned Captive Coal Shippers ("Concerned Coal Shippers" or "CCCS") hereby provide this notice of their intention to participate in the Board's public hearing in this proceeding. The Concerned Coal Shippers request that their counsel, Mr. C. Michael Loftus, be permitted to appear for fifteen (15) minutes.

The balance of this submission constitutes a summary of the Concerned Coal Shippers' anticipated testimony.

I. The Board's Competitive Access Rules Should be Modified

The 1985 competitive access rules have failed to serve their intended purposes under the statute and should be modified.

Those rules were the product of negotiations between certain railroad and shipper interests. The ICC did not engage in an extensive analysis of those rules prior to their adoption, but instead, largely deferred to the agreement of the industry interests with the firm expectation that the new rules would enhance competitive access, would provide a significant benefit to shippers and would promote competition among railroads. *See* CCCS Comments at 51-52. The rules include an "anticompetitive" conduct standard that

– as the AAR itself readily acknowledges – goes well beyond the literal requirements of Title 49. *See* CCCS Reply Comments at 52-53 (quoting AAR Comments at 36-37).

As a result of the anticompetitive conduct standard, the competitive access rules have prevented shippers from obtaining – or even seeking – competitive access relief under Title 49 for more than twenty-five years. Effectively, these rules have administratively repealed Section 10705 and Section 11102. This result is inconsistent with the terms of the statute, which *inter alia*, require the Board to prescribe alternative through routes found to be desirable in the public interest.

II. The Board has the Authority to Change its Own Rules

Some of the railroads participating in this proceeding (Norfolk Southern Railway Company ("NS"), CSX Transportation, Inc. ("CSXT"), and Canadian Pacific Railroad Company ("CP")) argue that the Board lacks the authority to modify its own competitive access rules. In particular, these three railroads argue that Congress' enactment of the ICCTA and its refusal to make any subsequent changes to Title 49 have permanently frozen the agency's regulations absent further Congressional action.

The principal legal authority they rely upon is *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). This case involved the application of the Supreme Court's *Chevron* analysis in a situation in which Congress was found to have spoken directly to the issue in dispute. There is no suggestion that Congress has spoken directly to the question of competitive access. The *Brown & Williamson* case therefore provides no support for the argument that the Board lacks the authority to modify its own rules.

The more appropriate and reasonable interpretation of the events associated with the passage of the ICCTA is that Congress intended to leave the administration of Sections 10705 and 11102 in the hands of this agency.

III. The CCCS Proposals

The Concerned Coal Shippers have made a series of proposals principally designed to establish bright-line standards for determining whether and when the Board should prescribe alternative through routes under Section 10705, including through routes that would short-haul a carrier. Where the R/VC ratio associated with the origin-to-destination routing currently available exceeds a specified trigger level, the shipper would be entitled to the prescription of an alternative through route. The Concerned Coal Shippers respectfully submit that their proposed standards – which are based upon the Board's RSAM and $R/VC_{>180}$ calculations – constitute appropriate means of administering the very general language of Section 10705 (*i.e.*, "desirable in the public interest," "adequate," and "more efficient or economic"). The proposed reliance on R/VC calculations and revenue adequacy measures is consistent with the statutory language itself (which, as noted, contemplates recourse to "economic" considerations), and has the added benefit of establishing a link between through route relief and the financial standing of the carrier in question.

The Concerned Coal Shippers also have proposed that, absent agreement between carriers, divisions on prescribed through routes should be set on a mileage pro-rate basis. Further, the Concerned Coal Shippers have proposed that the existence of a

prescribed alternative through route should not defeat a market dominance demonstration in a SAC case regarding the existing routing and that the existing routing likewise should not defeat a market dominance demonstration on the prescribed routing.

IV. Responses to Commenting Parties

Several sets of Reply Comments in this proceeding respond to the CCCS Comments.

- BNSF Railway Company ("BNSF") argues that the Concerned Coal Shippers' access proposals, which are based upon R/VC ratios, improperly seek to curtail differential pricing and therefore should be rejected. BNSF Reply at 7. BNSF's argument that maximum rate cases are the only context in which rate levels should be considered is inconsistent with the language of Section 10705, which as noted above, explicitly contemplates the Board's evaluation of economic factors in deciding whether to prescribe through routes. Likewise, BNSF's argument misstates the nature of the CCCS proposals, which would not impact the manner of determination of maximum reasonable rates. BNSF may wish that Title 49 lacked any provision regarding the prescription of alternative through routes, but the long-standing language of Section 10705 provides a clear indication of Congress' view that competitive access remedies should exist in addition to rate remedies.

- The Association of American Railroads ("AAR") criticizes the Concerned Coal Shippers' discussion of the "may/shall" distinction in the language of Sections 10705 and 11102 and argues that this discussion is circular. AAR Reply

Comments at 37-38. There is no question, however, that Congress modified the through route statute in 1920 to add the "shall" formulation and that Congress has left that revised language in place despite repeated subsequent changes to the statute. CCCS Comments at 25-28. Moreover, there is no question that in *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988), the D.C. Circuit relied upon the permissive nature of the reciprocal switching/terminal trackage rights provisions of the statute as a basis for affirming the ICC's adoption of the "anticompetitive" conduct requirement in the competitive access rules. CCCS Comments at 58-61. Contrary to the AAR's claim, the *Midtec* case includes the determination that Congress "almost certainly" intended through route prescription to be more available than other competitive access remedies. *Midtec*, 857 F.2d at 1501.

- In their Reply filings, NS and CP claim that the Concerned Coal Shippers' discussion of relevant history improperly fails to address the significance of the ICCTA on through route prescription. *See* NS Reply at 7; CP Reply at 12-13. The ICCTA, however, did not modify the key language of Section 10705(a) regarding through route prescription. Accordingly, the most appropriate interpretation of that Act is that is does not have *any* impact on the manner in which the Board should evaluate through route prescription requests.

- Finally, the American Short Line and Regional Railroad Association ("ASLRRA") argues that, if the Board adopts the CCCS proposals, it should ensure that the interests of short line carriers are protected. ASLRRA Reply at 7-9. With regard to

divisions, ASLRRA insists that a straight mileage prorate would be "highly destructive" to small railroads because of their high fixed costs per car-mile relative to Class I's (*id.* at 7), but in its opening Comments, ASLRRA explained that a small railroad typically only receives a contractual allowance from its interline connection and has no pricing discretion or authority. ASLRRA Comments at 6. ASLRRA provides no evidence to support the argument that a straight mileage prorate would be less favorable to short lines than this type of allowance payment.

Respectfully submitted,

CONCERNED CAPTIVE COAL SHIPPERS

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